Supreme Court, U.S.
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NO. 92-1957

IN THE

**SUPREME COURT OF THE UNITED STATES**

October Term, 1992

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TORRENCE GIPSON,

Petitioner,

v.

UNITED STATES,

Respondent.

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On Petition for Writ of Certiorari from the
United States Court of Appeals
for the Eighth Circuit

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

1. Whether the sentence enhancing provisions of 18 U.S.C. § 924(e)(i) - after the State sends the felon a document stating that all his civil rights have been restored - may be imposed with out "expressly" forbidding the possession of firearms as stated in 18 U.S.C. § 921(a)(20) or citing a federal or state statute which expressly forbids the possession of a firearm by a "convicted" felon?

2. Whether a subsequent statutory withdrawal of a prior felon's right to possess firearms - after the State sends the felon a document stating that he is no longer "convicted" and that all his civil rights have been restored - retroactively validates a prior conviction for purposes of the sentence enhancing provisions of 18 U.S.C. § 924(e)(i)?

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IN THE

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TORRENCE GIPSON

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UNITED STATES

Respondent.

On Petition for Writ of Certiorari to the
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for the Eighth Circuit

**PETITION FOR A WRIT OF CERTIORARI**

Petitioner, Torrence Gipson, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Eight Circuit entered in this case on February 4, 1993.

**OPINIONS BELOW**

The opinion of the Court of Appeals, which is unreported, is set forth at A. (1a-7a)[1].

[1]References to "A." are to the appendix to this petition.

The opinion of the District Court, which is also unreported, is set forth at A. (7a-11a). The order of the Court of Appeals denying a Motion for Leave to File a Petition for Rehearing Out of Time, is at A. (12a). The Order of the Court of Appeals remanding the case to the District Court is at A. (13-14a).

**JURISDICTION**

The judgment of the Court of Appeals was entered on February 4, 1993. This Court has jurisdiction pursuant to Title 28 U.S.C. §1254(1).

**STATUTES INVOLVED**

The text of the following statutes, relevant to the determination of the present case, are set forth below:

TITLE 18 U.S.C. §921(a)(20) states:

(20) The term "crime punishable by imprisonment for a term exceeding one year" does not include--

(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other

similar offenses relating to the regulation of business practices, or
(B) any Statute offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may now ship, transport, possess, or receive firearms.

TITLE 18 U.S.C. §922(g)(1), in pertinent part, states:

"(g) It shall be unlawful for any person to transport or ship in interstate or foreign commerce, any stolen firearm or stolen ammunition, knowing or having reasonable cause to believe the same to have been stolen.
(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

TITLE 18 U.S.C. §924(e) states:

(e)(1_ In the case of a person who violates section 922(g) of this title [18 USCS § 922(g)] and has three previous convictions by any court referred to in section 922(g)(1) of this title [18 USCS § 922(g)(1)] for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and

imprisoned not less than fifteen years, and notwithstanding any other provisions of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g) [18 USCS § 922(g)], and such person shall not be eligible for parole with respect to the sentence imposed under this subsection.

(2) As used is this subsection--

(A) the term "serious drug offense" means--

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the first section or section 3 of Public Law 96-350 (21 U.S.C. 955A et seq.), for which a maximum term of imprisonment of ten years or more is prescribed by law; or (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law; and

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--

(i) has as an element the use, attempt use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

## STATEMENT OF THE CASE

Torrence Gipson was charged in a two count indictment of the violation of Title 18 §§ 922(a)(2) and 924(a)(1)(b) and the violation of Title 18 §§ 922(g)(1), 924(a)(2) and 924(e)(1).

In the first count, Mr. Gipson was accused of making false statements on a Firearms Transaction Record Form at the Devils Lake, North Dakota K-Mart store when he purchased a Marlin .22 caliber rifle as a Christmas present for his son. Mr. Gipson was alleged to have lied about prior convictions.

The second count accused Mr. Gipson of illegally possessing the same .22 caliber Marlin in violation of Federal Firearms laws.

A jury trial was held on November 13 and 14, 1991. The Defendant was convicted on Count 2. Count 1 was dismissed. The Honorable Paul Benson sentenced Mr. Gipson to 15 years confinement based upon the Court's interpretation of the sentence enhancement provisions of Title 18 § 924(e)(1).

Mr. Gipson now appeals the conviction and the sentence. The basis of the appeal is that the provisions of Chapter 44 do not apply to Mr. Gipson because he has had his civil rights fully restored by both the State of Illinois and the State of North Dakota.

**REASONS FOR GRANTING THE WRIT**

**I. The Eighth Circuit has decided an important question of federal law which has not been, but should be, settled by this Honorable Court.**

The language of the statute drafted by congress set forth the requirement that the convicted felon know with express certainty that he or she is not allowed to possess firearms 18 U.S.C. §921(a)(20). Section 921(a)(20) states:

> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for the purposes of this chapter, unless such pardon, expungement, or

> restoration of civil rights **expressly** provides that the person may not ship, transport, **possess**, or receive firearms [Emphasis added].

The plain language of the statute requires the "restoration" of the civil rights to contain language "expressly forbidding" the possession of firearms. The "unless" clause states that a prior state conviction is not a conviction for purposes of the federal law unless the document bestowing the person's rights "expressly" provides that the person may not "ship, transport, possess, or receive firearms." 18 U.S.C. § 921(a)(20).

The Senate Judiciary Committee Report cited in Cassidy specifically states:

"In the event that the official granting pardon, restoration of rights or expungement of record does not desire it to restore to firearm ownership, this provision is rendered inapplicable where the order or pardon expressly provides that the person may not possess firearms." U.S. v. Cassidy, 899 F.2d at 543, 548, (6th Cir. 1990) quoting S. Rep. No. 970476,

97th Cong., 2d. Sess. at p. 12. Having reviewed the full legislative history, the Hammonds Court found that Congress did, in fact, intend the "'pardon/expungement/restoration of civil rights' to mean a 'full' pardon, 'full' expungement and 'full' restoration of rights." U.S. v. Hammonds, 786 F.Supp. 650, 666 (E.D. Mich. 1992). Senator Orin Hatch, one of the co-sponsors, explained that one of the purposes of the bill was to override certain federal court decisions and to lift the bar imposed by those decisions against persons from possessing firearms "who have been pardoned, or **who have had their full civil rights restored** pursuant to State Law." 131 Cong. Rec. § 8699.

In this particular case, the restoration of Mr. Gipson's civil rights was contained in a document entitled "Order for Discharge". This document's failure to expressly refuse to restore Mr. Gipson's right to possess a firearm removes the conviction for consideration for enhancement purposes. The Illinois conviction

from which Mr. Gipson's sentence was commuted by the Governor of Illinois is the type of conviction 18 U.S.C. §921(a)(20) expressly excludes in enhancing a subsequent possession of firearms sentence to the mandatory fifteen years prescribed by 18 U.S.C. §924(e)(i). The statutory language of 18 U.S.C. §921(a)(20) contradicts the decision of this court in United States v. Ellis where the Eighth Circuit held that the Convicted felon's rights must have actually been restored. United States v. Ellis, 949 F.2d 952 (8th Cir. 1991). In Richard Grant Davis v. United States, 1992 U.S.App. Lexis 18001 (8th Cir. 1992), the Eighth Circuit salvaged an enhanced sentence by rewriting congressional legislation to include items clearly excluded by the statute.

The Eighth Circuit Court has shown its reluctance in accepting the statutory language of Congress by searching the individual state statutes for grounds to allow conviction to stand in opposition to the express requirements

and intent of Congress. 18 U.S.C. 921(a)(20) requires that the "pardon, expungement, or restoration of civil rights" must "expressly provide that the person may not ship, transport, possess or receive firearms."

**II. The Eighth Circuit has rendered a decision in conflict with other circuits.**

The issue here is that when no such ban was placed at the time of the restoration of Mr. Gipson's civil rights, all rights which were not expressly forbidden were reinstated (See United States v. Traxel, 914 F.2d. 119, 124 (8TH CIR. 1990).

The clear language of Ill. Rev. Stat. Chap 38-1005-5-5 states:

> § 5-5-5. **Loss and Restoration of Rights.** (a) Conviction and disposition shall not entail the loss by the Defendant of any civil rights, except under this Section and Sections 29-6 and 29-10 of the Election Code, as now or hereafter amended.

In Traxel, the Eighth Circuit examined Minn. Statute 609.165 Sub. 1 (1985) stating:

> "[W]hen a person has been deprived of civil rights by reason of conviction of a crime and is thereafter discharged, such discharge shall restore the person to all civil rights and to full citizenship."

The cases of Erwin and Whitley appear to combine Ill. Rev. Stat. 1005-5-5 and Ill. Revised Stat. Chap 38 Para. 24-1.1(a) to accomplish the express denial of the right to possess firearms. U.S. v. Whitley, 905 F.2d 163 (7th Cir. 1990); U.S. v. Erwin, 902 F.2d 510 (7th Cir. 1990). However, since Ill. Revised Stat. Chap 38-24-1.1(a) did not exist at the time of Mr. Gipson's discharge, the "express" requirement cannot be met and the conviction cannot be used for enhancement purposes. See United States v. Traxel, 914 F.2d 119 (8th Cir. 1990). The fact that Mr. Gipson may not now possess firearms in Illinois or North Dakota is inconsequential. Because 18 U.S.C. §921(a)(20) states "has had civil rights restored" and it is clear that in March, 1984, Mr. Gipson's rights under 1005-5-5 (like Traxel) were restored without possession of firearms being expressly

forbidden, the conviction cannot be used for enhancement purposes. United States v. Traxel, 914 F.2d 119 (8th Cir. 1990). The fact that the Illinois legislature later made it illegal for Mr. Gipson to possess a firearm does not alter the fact that at the time of his discharge all of his civil rights were restored, including the right to ship, transport, possess, or receive firearms. Id.

United States v. Whitley and United States v. Erwin stand for the proposition that Ill. Rev. Stat. 1005-5-5 does not restore the right to possess a firearm and that such a right is forbidden under law. United States v. Whitley, 905 F.2d 163 (7th Cir. 1990); United States v. Erwin, 902 F.2d 510 (7th Cir. 1990). Therefore, whether Ill. Rev. Stat. Chap 38 Para. 24-1.1(a) can constitutionally alter Mr. Gipson's present rights is inconsequential based on the unambiguous language of 18 U.S.C. §921(a)(20).

In Erwin and Whitley the denial of the ability to possess firearms was present in the

discharge of the felons. Id. This also takes the case at bar out of the Erwin analysis and it directly in line with Traxel which would mandate that the convictions be eliminated under 18 U.S.C. §921(a)(20).

In this case, Mr. Gipson's rights were fully restored on the day he received his discharge under 1005-5-5 making the prior convictions not applicable under 18 U.S.C. §924(e)(i) for enhancement purposes. The later ban can only effect Mr. Gipson's right to bear arms in Illinois, but cannot retroactively deny that Mr. Gipson's civil rights were restored. The revocation of a restored right cannot then rejuvenate a previously non-predicate offense.

The United States Supreme Court has on numerous occasions strongly stated that if the plain language of a statute is clear and unambiguous, it is not for the Courts to rewrite the legislation so as to apply it in specific situations; but, to interpret the statute as written. Ford Motor Credit Co. v. Cenance, 452

US 155 (1980); Blum v. Stenson, 465 US 886 (1983); Zenith Radio Corp v. United States, 437 US 443, 450 (1978). The duty to make laws falls upon the legislative branch, not the judicial branch. The Courts must follow Congressional intent in applying the laws enacted by Congress.

Several courts have addressed the issue of subsequent statutes forbidding a prior felon's possession of a firearm. There seems to be little chance of a consensus without the direction of the United States Supreme Court.

In United States v. Cardwell, 967 F.2d 1349 (9th Cir. 1992), the situation was similar to the present case. Mr. Cardwell was charged with possession of a shotgun and rifle. At that time, he had a prior felony conviction for burglary. His 1985 discharge did not expressly forbid the possession of firearms. Subsequent to the 1985 discharge, the Oregon Legislature created Or.Rev.Stat § 166.270(1) (1989) which criminalized the possession of any firearm by a felon where it's predecessor had forbidden the

possession of only pistols and machine guns.

The Ninth Circuit considered the case and found that Or.Rev.State § 166.270(1) (1989) could not act to rejuvenate the prior conviction under the definition of 18 U.S.C. § 921(a)(20). Without the burglary conviction, the Ninth Circuit overturned the 18 U.S.C. § 922(g) conviction.

The Ninth Circuit also considered a similar case in United States v. Dahms, 938 F.2d 131 (9th Cir. 1991). Mr. Dahms was charged under 18 U.S.C. § 922(g). He was found in possession of a shotgun. Id. The Ninth Circuit found that Michigan had restored Mr. Dahms rights when it released him from his parole in 1983. Id. The Court found that Michigan had restored his right to vote and hold public office and sit on a jury. Id. The Court further found that since Michigan only restricted a prior felon's right to possess a single type of firearm, a pistol, it had substantially restored Dahm's rights and his Michigan conviction was exempted from

consideration under 18 U.S.C. §§ 921(a)(20) and 922. Id. Based on that rationale the Court reversed Dahm's conviction. Id.

Shortly after the Dahm's decision, the United States District Court for the Eastern District of Michigan ruled on the case of United States v. Butler. United States v. Dahms, 931 F.2d 131 (9th Cir. 1991); United States v. Butler, 788 F.Supp. 944 (E.D.Mich. 1991). There, under similar circumstances, the Court held that Michigan had not restored Butler's rights and his prior conviction was applicable under 18 U.S.C. § 921(a)(20). Id. The theory used in Butler to sustain the use of the conviction was: Since a convicted felon must be removed from a jury as challenged for cause, then his rights were not fully restored and less than a full restoration of rights allows the conviction to be used under 18 U.S.C. § 921(a)(20). Id.

18 U.S.C. § 921(a)(20) causes inconsistent application when foreign circuits attempt to use

the law of a state not in this Circuit and must divine how a state might interpret their own laws. The discrepancy between Dahm's and Butler is clear. United State v. Dahms, 938 F.2d 131, (9th Cir. 1991), United States v. Butler, 788 F.Supp. 944 (E.D.Mich. 1991).

Such discrepancies between circuits are not uncommon. The most significant to the instant case is the comparison of United States v. Haynes, 961 F.2d 51 (4th Cir. 1992) and the instant case.

In Haynes, the Defendant received a discharge and neither an express provision forbidding firearms appeared on the document nor was a statute cited which would prohibit possession of a firearm. Id. Similar to the case at bar, a law was subsequently adopted criminalizing possession of a firearm by a felon. Id. The Court addressed the fact that the statute now made it a criminal act under state law for a felon to possess a firearm, and stated that a subsequent change in the law would

not wipe out the exemption of the conviction under 18 U.S.C. § 921(a)(20). Id. The Court held that it must address the restoration of rights at the time of discharge and not at the time of possession. The Court relied on two main decisions for overturning Haynes' conviction. United States v. McBryde 938 F.2d 533 (4th Cir. 1991), a case from its own circuit, and United States v. Traxel 914 F.2d 119 (8th Cir. 1990), which the Haynes Court cited with approval. In the case at bar under a very similar fact pattern the Eighth Circuit ruled the conviction could be used under 18 U.S.C. § 921(a)(20). The Eighth Circuit placed great weight on the rationale of United States v. Erwin, 902 F.2d 510 (7th Cir. 1990), virtually ignoring its own precedent in United States v. Traxel 914 F.2d 119, (8th Cir. 1990).

Inconsistencies are invited when each Circuit relies on another Circuit's decision and shortly thereafter the Circuit whose decision was relied upon rules differently in similar

cases.

## CONCLUSION

This case presents for the Court's review, the current problem regarding 18 U.S.C. § 921(a)(20), The Fourth Circuit is relying on the Eighth Circuit's decision in Traxel: meanwhile, the Eighth Circuit has abandoned Traxel to follow the rationale of the Seventh Circuit in Erwin.

The undue weight placed upon Erwin is enormous because of the obvious factual differences. Here, Mr. Gipson received a document restoring all his civil rights, but in Erwin no such document was present. The Erwin Court stated:

> "If the state sends the felon a piece of paper implying that he is no longer convicted and that all of his civil rights have been restored, a reservation in a corner of the States penal code cannot be the basis of a federal prosecution. A state must tell the felon point blank that weapons are not kosher."

and further,

> "It must mean, therefore that the

> state sometimes must tell the felon that under state law he is not entitled to carry guns else § 922(g) does not apply."

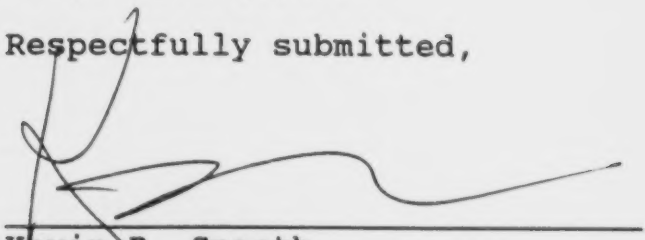
It is imperative that the United States Supreme Court grant Certiorari to allow the parties to present the Court with a case appropriate to render a decision which will guide all of the Circuits in the application of 18 U.S.C. § 921(a)(20).

A later abrogation of rights cannot serve to unring the bell proclaiming the restoration of rights. Where it may or may not be constitutional to adopt a statute which serves to dampen the full restoration of rights, once the bell for the restoration of civil rights is rung, it can never be said that it was not rung, but only that some rights are going to be reduced.

Therefore, under a proper application of Erwin and Traxel, the prior convictions of Mr. Gipson must be exempted by 18 U.S.C. §921(a)(20) and excluded from consideration for sentence enhancing

purposes by 18 U.S.C. §924(e)(i).

Respectfully submitted,



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# APPENDIX

# APPENDIX

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**APPENDIX**

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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No. 92-1132
No. 92-3306

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UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

TORRENCE GIPSON, a/k/a
JOHN CROSWELL, a/k/a
TORRANCE GIPSON.
Defendant-Appellant.

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On Appeal from
the United States District Court
for the District of North Dakota

[Filed February 4, 1993]

Before: Wollman, Circuit Judge,
BRIGHT and ROSS,
Senior Circuit Judges.

Torrence Gipson, who had previously been convicted on three violent felonies, was convicted of possessing a firearm, in violation of 18 U.S.C. § 922(g)(1), 924(a)(2) and 924(e)(1). Because of Gipson's three previous

felonies, the district court[1] sentenced him to the fifteen-year mandatory minimum sentence provided by 18 U.S.C. § 924(e)(1), to be followed by three years of supervised release. On appeal, Gipson argued that his prior Illinois convictions could not be used as predicate offenses for the purposes of section 924(e)(a), because his civil rights had been restored unconditionally within the meaning of 18 U.S.C. §921(a)(20). We retained jurisdiction and remanded the case to the district court with directions to consider Gipson's claim. On remand, the district court denied Gipson's challenge to his conviction and sentence. We now affirm.

I.

On February 24, 1991, officers from the Devils Lake, North Dakota Police Department responded to a domestic disturbance in a trailer park. The officers arrested Gipson at the scene

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[1]The Honorable Paul Benson, United States District Judge for the District of North Dakota.

and took him to the Law Enforcement Center. When emptying Gipson's pockets in the course of making an inventory of his possessions, the police found three .22 caliber cartridges. In their subsequent search of Gipson's trailer, they recovered a .22 rifle, which records indicate Gipson had purchased from the K-Mart store in Devils Lake on December 1, 1990.

II.

Title 18 U.S.C. § 922(g) provides, in pertinent part, that "[i]t shall be unlawful for any person--(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to . . . possess . . . any firearm . . . which has been shipped or transported in interstate or foreign commerce." If an individual convicted under 18 U.S.C. § 922(g) has three previous convictions for violent felonies committed on distinct occasions, 18 U.S.C. § 924(e)(2) provides that he "shall be fined not more than $25,000 and imprisoned not less that fifteen years."

At the time of his arrest on the present charge, Gipson had been convicted of three violent felonies in Cook County, Illinois, committed respectively on June 8, 1976, June 21, 1976, and October 1, 1978. On March 21, 1984, he was issued an Order for Discharge with respect to those convictions.

For a felony convictions to be considered a predicate offense under 18 U.S.C. § 924(e), it must fit within the statutory definition in section 921(a)(20). United States v. Ellis, 949 F.2d 952, 953 (8th Cir. 1991). Section 921(a)(20) provides, in pertinent part:

> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for the purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

We have noted that for a person to have his

civil rights restored by a state for the purposes of section 921(a)(20), the relevant state must actually have restored the felon's right to possess firearms. Ellis, 949 F.2d at 953; United States v. Traxel, 914 F.2d 119, 123 (8th Cir. 1990). Accord, United States v. Ramos, 961 F.2d 1003, 1008-09 (1st Cir. 1991), cert. denied, 113 S.Ct. 364 (1992).

Gipson's cites two separate Illinois statutory provisions in support of his argument that Illinois restored his civil rights, including his right to possess a firearm, when he was discharged from his underlying felony convictions, namely, Ill. Ann. Stat. ch. 38, ¶ 83-4 (Smith-Hurd 1977).

At the time Gipson received his Order for Discharge, Ill. Ann. Stat. ch. 38, ¶ 83-4 provided that ex-felons could apply for a firearm owner's identification card after a five-year waiting period. The district court found nothing in the record to indicate that Gipson had made such an application or that

possession of a firearm owner's identification card "is tantamount to the restoration of the specific civil rights allowing possession of a firearm." District Court Memorandum and Order of September 28, 1992, at 3. We agree with the district court's interpretation of this statute.

Gipson also relies upon Ill. Ann. Stat. ch. 38, ¶ 1005-5-5 (Smith-Hurd 1982), which restores certain license rights and privileges lost as a result of a criminal conviction. Although the statute discusses the restoration of a discharged felon's right to vote and hold public office, it makes no specific mention of his right to possess a firearm. The Seventh Circuit addressed the issue in United States v. Erwin, 902 F.2d 510, 512-13 (7th Cir.), cert. denied, 111 S. Ct. 161 (1990), and held that paragraph 1005-5-5 restores only the right to vote and to hold office, but not the right to possess or carry firearms. The district court followed Erwin and held that paragraph 1005-5-5 did not restore Gipson's right to possess firearms

within the meaning of 18 U.S.C. §921(a)(20). We agree.

We have considered the other arguments raised by Gipson and we find them to be without merit.

The judgment of the district court is affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHEASTERN DIVISION

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Case No. C2-91-65

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TORRENCE GIPSON a/k/a
JOHN CROSSWELL, a/k/a
TORRANCE GIPSON,

Defendant.

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**MEMORANDUM AND ORDER**

[Filed September 28, 1992]

Defendant Gipson appealed his conviction and sentence for violation of 18 U.S.C.

§ 922(g)(1), 924(a)(2) and 924(e)(1). Defendant, on appeal, raised the issue for the first time, that Illinois had restored his civil rights within the meaning of 18 U.S.C. §921(a)(20). The Eighth Circuit Court of Appeals, while retaining jurisdiction, remanded the case with directions to consider defendant's claim. A hearing was held on September 1, 1992. It is undisputed that defendant had three prior felony convictions in Circuit Court, Cook County, Illinois.

Defendant has two hurdles to overcome. Initially he must establish that his civil rights were restored within the meaning of 18 U.S.C. § 921(a)920). The second hurdle presents itself as Ill. Ann. Stat. ch. 38, para. 24-1.1 (Smith Hurd 1992) which has, since July 1, 1984, prohibited ex-felons from possessing firearms in Illinois. Gipson contends this statute, as it applies to him, violates the Ex Post Facto Clause. Because the court concludes that Gipson did not have his civil right to possess a

firearm restored within the meaning of § 921(a)(20) the Ex Post Facto challenge is irrelevant.

To have "civil rights restored" for purposes of section 921(a)(20), the state in which the defendant was convicted for the underlying felony must have actually restored that felon's right to possess a firearm. United States v. Ellis, 949 F.2d 952, 953 (8th Cir. 1991). Thus, this court must look to Illinois law to determine whether Gipson had his right to possess a firearm restored.

In support of his contention that Illinois restored his right to possess a firearm, defendant relies on two separate provisions of Illinois statutory law that were in effect when defendant was discharged from his underlying felony convictions. See Ill. Ann. Stat. ch. 38, para. 1005-5-5 (Smith-Hurd 1982)(loss and restoration of rights) and Ill. Ann. Stat. ch. 38 para. 83-4(Smith-Hurd 1977)(application for firearm owner's identification card). Defendant

contends his right to possess a firearm was restored through the operation of these two statutes.

Ill. Ann. Stat. ch. 38, para 83-4, as it provided at the time of Gipson's discharge, appears to envision that ex-felons, after a five year waiting period, could make application to acquire a firearm owners identification card. There is nothing in the record to indicate that Gipson made application for the identification card, that an application was approved, or even that possession of a firearm owner's identification card[1] is tantamount to the

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[1].Ill. Ann. Stat. ch. 38 para. 83-4 (Smith-Hurd 1977) provided in pertinent part as follows:

(a) Each applicant for a Firearm Owner's Identification Card shall:
  (1) Make application on blank forms prepared and furnished at convenient locations throughout the State by the Department of Law Enforcement; and
  (2) Submit evidence under oath to the Department of Law Enforcement that: . .
    (ii) He has never been convicted of a felony under the laws of this or any other jurisdiction within the prior 5 years and he has never been confined to a penitentiary within the prior 5 years . . .

restoration of the specific civil right allowing possession of firearm.

The other statute Gipson relies on is Ill. Ann. Stat. ch. 38, para. 1005-5-5 (Smith-Hurd 1982). This statute relates to the restoration of license rights and privileges lost as a result to the criminal conviction. Specifically the statute discusses the restoration of a discharged felon's right to hold public office and to vote. No mention is made of the specific right to possess a firearm. In light of the decision in United States v. Erwin, 723 F.Supp. 1285 (C.D. I.. 1989), aff'd 902 F.2d 510 (7th Cir. 1990), wherein the court held that section 1005-5-5 restored only the right to vote and hold public office but not the right to possess firearms, this court holds that the State of Illinois has not restored Gipson's civil right to possess a firearm within the meaning of section 924(a)(20). Defendant's conviction and sentence are legal. Appellant's challenge to his conviction should be denied.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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No. 92-1132
No. 92-3306

---

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

TORRENCE GIPSON, a/k/a
JOHN CROSSWELL, a/k/a
TORRENCE GIPSON,

Defendant-Appellant.

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On appeal from
the United States District Court
for the District of North Dakota

[Filed April 6, 1993]

The motion for leave to file a petition for rehearing out of time has been considered by the court and is hereby denied.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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No. 92-1132
No. 92-3306

---

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

TORRENCE GIPSON, a/k/a
JOHN CROSSWELL, a/k/a
TORRANCE GIPSON,

Defendant-Appellant.

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On Appeal from
the United States District Court
for the District of North Dakota

[Filed June 24, 1992]

Appellant has requested that the case be remanded for the purpose of permitting the District Court to consider appellant's contention that his unconditional release from his Illinois convictions restored his right to possess firearms, thus rendering void his conviction under 18 U.S.C. Section 922(g)(1),

924(a)(2), and 924(e)(1). The Government does not oppose the request for remand. Accordingly, and without in any manner indicating a view on the merits of appellant's contention, the court remands the case to the District Court for the purpose of considering appellant's challenge to his conviction based upon the restoration of his civil rights under Illinois law. The Court retains jurisdiction of the case and directs that any subsequent appeal be submitted to this panel.

(2)

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 92-1957

# In the Supreme Court of the United States

OCTOBER TERM, 1993

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TORRENCE GIPSON, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether petitioner was a previously convicted felon for purposes of 18 U.S.C. 922(g)(1) and 924(e)(1).

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# In the Supreme Court of the United States

OCTOBER TERM, 1993

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No. 92-1057

TORRENCE GIPSON, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 985 F.2d 412. The opinion of the district court (Pet. App. 7a-11a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on February 4, 1993. The petition for a writ of certiorari was filed on May 5, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the District of North Dakota, petitioner was convicted of possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 15 years' imprisonment. The court of appeals affirmed.

1. In 1978 and 1979, petitioner was convicted of three felony offenses in Illinois state court.[1] Pet. App. 4a, 8a; Gov't C.A. Br. 7. After serving a term of imprisonment, petitioner was paroled in 1981. Gov't Supp. C.A. Br. Add. 1. On March 21, 1984, the Illinois Prisoner Review Board issued petitioner a document captioned "Order for Discharge." *Ibid.* The order stated that petitioner was "finally discharged" from his state convictions and that he was "relieve[d] * * * of all sentence obligation as described herein." *Ibid.* In addition, the order advised petitioner that "[y]our rights to vote and administer estates are regained, though you may be required to show this document to the registration authority." *Ibid.*

2. On August 7, 1991, a federal grand jury in the District of North Dakota returned an indictment charging petitioner with one count of making a false statement in connection with the acquisition of a firearm, in violation of 18 U.S.C. 922(a)(6) (Count 1), and one count of possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g)(1) (Count 2). Indictment 1-3. Count 2 alleged that petitioner had three previous state robbery convictions, thus subjecting him to a minimum term of 15 years' imprisonment under 18 U.S.C.

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[1] On March 13, 1978, petitioner was convicted of a robbery committed on June 8, 1976, and of an attempted robbery committed on June 21, 1976. On June 27, 1979, he was convicted of an armed robbery committed on October 1, 1978. Gov't C.A. Br. 7.

924(e)(1).[2] Indictment 3. After trial, the jury convicted petitioner on Count 2 of the indictment, and the district court sentenced him to the fifteen-year term of imprisonment required by Section 924(e)(1). Pet. App. 1a-2a.

3. On appeal, petitioner argued that his Illinois robbery convictions could not properly be considered as prior convictions for purposes of Sections 922(g)(1) or 924(e)(1). Relying on the definition of "crime punishable by imprisonment for a term exceeding one year" contained in 18 U.S.C. 921(a)(20), petitioner argued that the robbery convictions were not convictions for purposes of the federal firearms laws, because his civil rights had been restored under Illinois law upon his discharge from the state convictions.[3] Pet. App. 2a. The court of appeals

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[2] The sentence enhancement provision of 18 U.S.C. 924(e)(1) applies to previously convicted felons who possess or receive a firearm in violation of 18 U.S.C. 922(g)(1). Section 924(e)(1) provides, in pertinent part:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years * * *.

[3] Section 922(g)(1) of Title 18 forbids possession of firearms by "any person * * * who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. 922(g)(1); see also 18 U.S.C. 924(e)(2)(B)(i) (defining "violent felony" to include "any crime punishable by imprisonment for a term exceeding one year * * * that * * * has as an element the use, attempted use, or threatened use of physical force against the person of another").

In pertinent part, Section 921(a)(20), defines "crime punishable by imprisonment for a term exceeding one year" as follows (18 U.S.C. 921(a)(20)):

> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has

remanded the case to the district court for consideration of petitioner's challenge to his conviction and sentence. Pet. App. 13a-14a.

On remand, the district court rejected petitioner's claim that his Illinois robbery convictions did not qualify as prior convictions for purposes of the federal firearms statutes. Pet. App. 7a-11a. The court noted that the Illinois restoration of rights statute, on which petitioner relied, "discusses the restoration of a discharged felon's right to hold public office and to vote," but makes "[n]o mention * * * of the specific right to possess a firearm." Pet. App. 11a. Petitioner also relied on an Illinois statute which, at the time of his discharge from his state convictions, permitted ex-felons to apply for a "firearm owner's identification card" after a five-year waiting period. See Pet. App. 10a (citing Ill. Ann. Stat. ch. 38, para. 83-4 (Smith-Hurd 1977) (recodified at Ill. Comp. Stat. Ann. ch. 430 para. 65/4 (Smith-Hurd 1993)). The district court noted that "[t]here is nothing in the record to indicate that [petitioner] made application for the identification card, that an application was approved, or even that possession of a firearm owner's identification card is tantamount to the restoration of the specific civil right allowing possession of [a] firearm." Pet. App. 10a-11a. The court accordingly concluded that "the State of Illinois has not restored [petitioner's] civil right to possess a firearm within the meaning of" Section 921(a)(20). Pet. App. 11a.

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been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

Petitioner also argued that an Illinois statute prohibiting possession of firearms by convicted felons, which had become effective several months after petitioner was discharged from his prior convictions, could not constitutionally be applied to validate his prior convictions. See Pet. App. 8a. The district court rejected that claim as well, explaining that because it had concluded that petitioner's right to possess a firearm had not been restored, his ex post facto claim was "irrelevant." Pet. App. 8a-9a.

4. The court of appeals affirmed. Pet. App. 1a-7a. The court explained that "for a person to have his civil rights restored by a state for the purposes of section 921(a)(20), the relevant state must actually have restored the felon's right to possess firearms." Pet. App. 4a-5a. The court of appeals agreed with the district court that the Illinois restoration of rights statute "restores only the right to vote and to hold office, but not the right to possess or carry firearms," Pet. App. 6a (citing *United States* v. *Erwin*, 902 F.2d 510 (7th Cir.), cert. denied, 498 U.S. 859 (1990)), and that petitioner could not claim that his right to possess firearms had been restored by the statute permitting ex-felons to apply for a firearm owner's identification card after a five-year waiting period. Pet. App. 5a-7a.

## ARGUMENT

Petitioner contends (Pet. 6-21) that his three robbery convictions in Illinois did not come within the definition of a "crime punishable by a term of imprisonment exceeding one year" under 18 U.S.C. 921(a)(20), and thus could not be used as the basis for a conviction under 18 U.S.C. 922(g)(1) or to enhance his sentence under 18 U.S.C. 924(e)(1).

1. Petitioner contends that his prior convictions could not be counted for purposes of Section 921(a)(20)

because his order of discharge from those convictions restored his civil rights under Illinois law without expressly forbidding him from possessing firearms. That contention is without merit.

When petitioner's convictions were discharged, Illinois law precluded the restoration of petitioner's right to possess a firearm. See Ill. Ann. Stat. ch. 38, para. 24-3.1(a)(3) (Smith-Hurd 1961) (prohibiting possession of firearms by any person who "has been convicted of a felony under the laws of this or any other jurisdiction within 5 years from release from the penitentiary or within 5 years of conviction if penitentiary sentence has not been imposed") (repealed 1988).[4] Moreover, it is plain under Ill. Ann. Stat. ch. 38, para. 83-4 (Smith-Hurd 1977), which was in effect at the time of petitioner's discharge from his state convictions, that petitioner was categorically ineligible to own firearms as a matter of state law for five years. Thus, the discharge petitioner received could not, as a matter of Illinois state law, have restored his right to possess firearms. Accordingly, under the terms of Section 921(a)(20), petitioner's prior convictions could be counted because his restoration of rights was subject to the express condition that he "may not * * * possess * * * firearms."

Petitioner nonetheless argues (Pet. 6-10) that Section 921(a)(20) permits courts to consider only the document evidencing his restoration of rights. That narrow con-

[4] Possession of firearms in violation of this statute was a misdemeanor. See Ill. Ann. Stat. ch. 38, para. 24-3.1(b) (Smith-Hurd 1961). Ill. P.A. 83-1056 (July 1, 1984), which added a provision making possession of firearms by convicted felons a felony, see Ill. Ann. Stat. ch. 38, para. 24-1.1 (Smith-Hurd 1961) (recodified at Ill. Comp. Stat. Ann. ch. 720, para. 5/24-1.1 (Smith-Hurd 1993)), and also amended Paragraph 24-3.1 to delete the provision limiting the restriction on felons' possession of firearms to five years after the date of conviction or release from incarceration.

struction of Section 921(a)(20) is inconsistent, however, with the statute's purpose of removing "the disabling effect of a felony conviction" only "when the state of conviction has made certain determinations, embodied in state law, regarding a released felon's civil rights and firearms privileges." *United States* v. *Cassidy*, 899 F.2d 543, 546 (6th Cir. 1990); see also *United States* v. *McLean*, 904 F.2d 216, 218 (4th Cir.), cert. denied, 498 U.S. 875 (1990); *United States* v. *Erwin*, 902 F.2d 510, 512 (7th Cir.) (Section 921(a)(20) "is designed to require federal rules to track state law"), cert. denied, 498 U.S. 859 (1990).

Contrary to petitioner's argument (Pet. 7), the language of Section 921(a)(20) does not mandate exclusive reference to the document evidencing the restoration of rights. Rather, the statute requires examination of the legal event itself. The scope of a convicted felon's restoration of rights, including its effect on his state-law firearms disability, is the true reflection of state law. There is nothing in the federal statute to indicate that Congress intended to restrict the state law inquiry to the document evidencing the restoration of rights, even when that restricted inquiry would result in an inaccurate characterization of the State's treatment of the defendant's state law offense. The courts of appeals have thus consistently held that Section 921(a)(20) requires a court to look to the "whole of state law" to determine the scope of an ex-felon's restoration of rights. See *United States* v. *Cassidy*, 899 F.2d 543 at 548 ("A narrow interpretation requiring that we look only to the document, if any, evidencing a restoration of rights, would frustrate the intent of Congress that we look to the whole of state law, including state law concerning a convicted felon's firearms privileges."); accord *United States* v. *Burns*, 934 F.2d 1157, 1160-1161 (10th Cir. 1991), cert. denied, 112 S. Ct. 1246 (1992); *United States* v. *Gomez*, 911 F.2d 219,

220 (9th Cir. 1990); *United States* v. *McLean*, 904 F.2d at 218.[5]

Petitioner also contends (Pet. 10-19) that the Illinois legislature's subsequent enactment of a statute making possession of firearms by a previously convicted felon a felony could not "rejuvenate" his robbery convictions after his civil rights had previously been restored. As we have explained, however, Illinois law already prohibited ex-felons from possessing firearms at the time petitioner was discharged from his robbery convictions. Thus, petitioner's statement (Pet. 10) that there was "no such ban * * * at the time of the restoration of [petitioner's] civil rights" is simply mistaken.

2. Petitioner contends (Pet. 14-18) that the decision in this case conflicts with the decisions in *United States* v. *Cardwell*, 967 F.2d 1349 (9th Cir. 1992); *United States* v. *Haynes*, 961 F.2d 50 (4th Cir. 1992); and *United States* v. *Dahms*, 938 F.2d 131 (9th Cir. 1991). That contention is without merit.

In each of the cases on which petitioner relies, the court held that an ex-felon's prior conviction could not be counted for purposes of the federal firearms statutes because the defendant was not barred by state law from possessing firearms at the time his civil rights were re-

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[5] Petitioner mistakenly relies (Pet. 19-20) on *United States* v. *Erwin*, 902 F.2d at 512-513, in which the court speculated about the possible application of the "expressly provides" language in the last clause of Section 921(a)(20) to a situation in which a convicted felon was misled by receipt of a restoration certificate "implying * * * that *all* civil rights have been restored." As the court noted, however, its discussion of that issue was dicta. 902 F.2d at 512. In any event, the order discharging petitioner from his convictions in this case did not mislead petitioner by implying that all of his civil rights had been restored; it merely stated that petitioner's "rights to vote and administer estates [were] regained." Gov't Supp. C.A. Br. Add. 1.

stored, or because state law did not prohibit the defendant from possessing the particular types of firearms at issue. See *United States* v. *Cardwell*, 967 F.2d at 1350 (defendant's possession of shotgun and rifle was legal under state law when his civil rights were restored); *United States* v. *Haynes*, 961 F.2d at 52-53 (state law did not prohibit possession of firearms by convicted felons when defendant's civil rights were restored); *United States* v. *Dahms*, 938 F.2d at 135 (although state law barred defendant's possession of pistols, state law did not restrict defendant's right to possess shotgun). In *Cardwell* and *Haynes*, the courts concluded that the scope of a defendant's restoration of rights must be determined as of the time his rights were restored. *Cardwell*, 967 F.2d at 1350-1351; *Haynes*, 981 F.2d at 52-53. Although the courts in those cases therefore held that later-enacted statutes outlawing possession of firearms by convicted felons could not be applied to ex-felons whose rights had previously been fully restored, this case does not present a similar situation. Because Illinois law prohibited petitioner from possessing any firearms at the time his civil rights were restored, there is no conflict between the decision in this case and the decisions on which petitioner relies.[6]

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[6] Petitioner also contends (Pet. 13-14, 19) that the Eighth Circuit's decision in this case "abandoned" that court's decision in *United States* v. *Traxel*, 914 F.2d 119 (8th Cir. 1990). Even if that were true, such an intra-circuit conflict would not warrant resolution by this Court. In fact, however, the reasoning of *Traxel* is consistent with the decision below. The *Traxel* court held that a Minnesota statute enacted in 1975 to limit a convicted felon's right to possess a pistol did not apply to a defendant whose civil rights had been restored in 1973 after a 1969 conviction. The court reasoned that at the time of the 1973 restoration of rights, Minnesota law imposed no restriction on the defendant's right to possess firearms. For that reason, the court held that the defendant's 1969 conviction could not be considered under 18 U.S.C. 921(a)(20). 914

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1993

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F.2d at 124-125. In considering the effect of the 1975 Minnesota law on the defendant's 1977 and 1978 convictions, however, the court observed that the statute:

> provides evidence that since 1975, those civil rights restored to convicted felons by [state law] exclude the right to possess firearms. Because the right to possess firearms is the civil right with which section 921(a)(20) is concerned, Minnesota felony convictions for which civil rights were restored after [1975] do not constitute convictions "for which a person has had civil rights restored" within the meaning of section 921(a)(20).

914 F.2d at 124. The analysis in *Traxel* thus supports the decision of the court below.